FINAL STATEMENT OF REASONS:

This action will amend provisions governing sample or specimen collection of DNA. Currently, if an inmate or parolee refuses to submit a DNA sample, the Department must get a court order to obtain a sample. This is burdensome, not only to the Department, but to the courts, and is inconsistent with the intent of Penal Code (PC) Section 295 et seq.

Senate Bill (SB) 1242, 2001-2002 Regular Session, amended PC Section 298.1 to allow the use of reasonable force to collect blood specimens, saliva samples, or thumb or palm print impressions from inmates or parolees who, after being requested to do so, refuse to provide such samples.

These regulations, Title 15, Sections 3025 and 3315, will bring these new procedures into compliance with the provisions of SB 1242.

Section 3025 is amended.

Subsection (a) is amended to provide that once the specified specimens are obtained, they be submitted to the Department of Justice (DOJ) as soon as administratively practicable. This brings the regulations into compliance with PC Section 296.1(c). The phrase "after receiving written notification in accordance with PC Section 298.1," has been stricken. The obligation to provide a specimen exists without written notification to the inmate or parolee. The legal obligation/duty attaches at the moment the offender is convicted of a qualifying offense. A writer's palm print impression was also added to the list of required specimens because the Palm Print Card, provided by the DOJ, requires such an impression.

Subsection (b) is unchanged.

Subsection (c) is amended to cite the correct statute. Also, the phrase "after receiving written notification in accordance with PC Section 298.1," was deleted for the same reasons explained above under subsection (a).

Subsection (d) is amended to cite the correct statute. In addition, this subsection allows local law enforcement authorities to designate a location where parolees are to have their specimens collected. This is necessary because local law enforcement authorities will be collecting specimens from parolees.

Subsection (e) is amended to provide for the disposition of specimens and to bring the regulations into compliance with the provisions of PC Section 298. This amendment is necessary to provide guidance to staff as to where the specimens are to be sent.

Subsection (f) is amended to specifically designate staff authorized to process forms or the specimens to ensure that the specimens and/or forms are handled and dispersed properly.

Subsection (g) is unchanged.

Subsection (h) is adopted to provide the consequences facing a parolee or inmate if he or she refuses to provide required specimens after being given written notification to do so. This subsection brings the regulations into compliance with PC Section 298.1.

Subsection (i) is adopted to provide that reasonable force, as defined, may be used to obtain the required specimens from an inmate or parolee. Reasonable force may only be used after the Facility/Correctional Captain or higher, or the administrative officer on duty has given written authorization to use such force. This is necessary to ensure that a person with authority approves the use of reasonable force to obtain specimens, and to bring the regulation into compliance with the provisions of PC Section 298.1(b) and SB 1242.

Subsection (j) is adopted to specifically state that all efforts to secure requisite specimen samples on a voluntary basis shall be employed before reasonable force is imposed. This is necessary to inform inmates and parolees that staff will use reasonable force to obtain the needed samples if the inmates or parolees do not cooperate. This, however, will only occur after all other efforts have failed.

Subsection (k) is adopted to include provisions for the videotaping of the use of reasonable force to obtain DNA samples when a cell extraction must be performed. This is necessary to bring the regulations into compliance with PC Section 298.1 and to protect the Department in possible litigation.

Section 3315 is amended.

Subsection (a) is amended to strike the provisions that allow for the refusal to submit to specimen collection and require a court order for forced compliance. This is necessary to be consistent with Section 3025 of the California Code of Regulations, and to bring the regulations into compliance with PC Section 298.1 and SB 1242. As stated above, compliance will be compelled with the use of reasonable force, if necessary.

Subsections (a)(1) and (a)(2) are unchanged.

ASSESSMENTS, MANDATES AND FISCAL IMPACT:

This action will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses or create or expand businesses in the State of California.

The Department determines this action imposes no mandates on local agencies or school districts; no fiscal impact on State or local government, or Federal funding to the State, or private persons. It is also determined that this action does not affect small businesses nor have a significant adverse economic impact on businesses, including the ability of California businesses to compete with businesses in other states, because they are not affected by the internal management of State prisons; or on housing costs; and no costs or reimbursements to any local agency or school district within the meaning of Government Code (GC) Section 17561.

DETERMINATION:

The Department has determined that no alternative considered would be more effective in carrying out the purpose of this action or would be as effective and less burdensome to affected persons.

PUBLIC COMMENTS:

Public Hearing: Held December 30, 2002, at 9:00 a.m.

No one attended the public hearing and no oral comments were received.

Summaries and Responses to Written Comments:

Commenter #1:

Comment A: Commenter contends the proposed rule change should be more specific and needs to clarify who the law applies to. He contends that the law is subject to abuse by the Department of Corrections and /or the Board of Prison Terms.

Accommodation: None.

Response A: The Department contends that this regulation is clearly and concisely written, and Section 3025(b)(4) refers to PC Section 296(a), which clearly specifies qualifying offenders. The decision to obtain a sample is not subject to official discretion. *People v. King* (2000) 82 Cal.App.4th 1363, 1373 ("*King*").

Comment B: Commenter contends the phrase "after receiving written notification in accordance with PC Section 298.1" has been struck because the legal obligation to supply the sample is attached at the moment the offender is convicted of a qualifying offense

Accommodation: None.

Response B: The Department agrees the legal obligation to provide a sample attaches at the moment the offender is convicted of a qualifying offense. However, the Department will provide written notification of this obligation prior to prosecuting a qualifying offender for refusal, for due process reasons. Regulation Section 3315(a)(3)(S) struck the reference to "in accordance with Penal Code Section 298.1" because written notice under the statute is provided prior to misdemeanor prosecution. Written notice of the obligation to provide a sample, or be prosecuted by the Department for a serious rules violation, warns of different consequences for refusal, and is a different notice and not specified in PC Section 298.1.

Comment C: Commenter contends that this regulation change may seem inconsequential, but to someone like the commenter who has been incarcerated since 1996 and has been studying the ex post facto and double jeopardy laws, this gives weight to his contention that the legislature did not intend the 1999 enactment of the DNA Act to apply to inmates who were "imprisoned or confined" before the enactment of the law.

Accommodation: None.

Response C: The Department contends that when a statute does not amend substantive criminal law, as in the case of the DNA Databank, the only question for purposes of ex post facto analysis is whether the requirement of submitting forensic identification samples constitutes punishment. *Rise v. Oregon* (9th Cir. 1995) 59 F. 3d 1556, ["*Rise"]* explicitly held that Databank programs do not punish. Profiles are matched only with evidence from unsolved crimes, and individuals are never charged again with the same crimes, as would indeed violate the prohibition against double jeopardy. *People v. King* (2000) 82 Cal.App.4th 1363 ["*King*"]. *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492 ["*Alfaro"]* explicitly held California's Databank constitutional in every respect.

Comment D: Commenter contends the Department of Corrections has been attempting to coerce him since 2000 to comply with Section 3025 and have never given him notice that he is subject to the use of force in order to make him comply. The commenter suggests that the Department should be more specific in these regulations to comport with the prohibitions on the passing of ex post facto laws, which provide for more severe punishment "after" a person has been "imprisoned and/or confined". Please see U.S. V. Pashow, cite as 11f.3d on page 880 2nd paragraph and U.S. V. Halper, 104 L. Ed 487, 109 S. Ct. at page 501 [5d].

Accommodation: None.

Response D: PC Section 298.1 provides explicit notice that correctional officers and peace officers may use reasonable force against individuals who refuse to provide samples as required by PC Section 295, et seq. **Please see Commenter #1 Response C above, regarding ex post facto objections.** *U.S. v. Pashow* held that parole is no different than supervised release for ex post facto analysis, and is not relevant to issues here. *U.S. v. Halper* is relevant, but was overruled by *Hudson v. U.S.* (1997) 522 U.S. 93, which held that the double jeopardy clause does not prohibit imposition of any additional sanction that could, in common parlance, be described as punishment and instead protects only against imposition of multiple criminal punishments for the same offense, and only when such occurs in multiple proceedings. Although relevant, *Hudson* is not dispositive, because *Rise* has held sampling is not a punishment.

Commenter #2:

Comment A: Commenter contends that this proposed regulation will help alleviate the burden placed on the Department as well as the courts. However, commenter cannot agree with the Department's use of language in subsection (a) which requires whenever an inmate's record indicates he has a prior conviction for an offense listed in PC Section 296(a), the inmate shall provide DNA and DNA preparation specimens with force if necessary. Commenter contends that not only is this language inconsistent with ex post facto and due process concerns, but the Department may not have the authority to relegate the facts of prior crimes. Commenter contends the proposed amendment will best achieve its objective if this language is left out because not all prior crimes will be so easily defined for purposes of PC Section 296(a). In addition, the commenter contends that Correctional Counselors will have to evaluate numerous Central files in order to ascertain which cases qualify under the code and then may have a situation where such decision is left up to the discretion of untrained state employees.

Accommodation: None.

Response A: The Department contends that the Databank statutes explicitly provide PC Section 296.1(c): "This subdivision applies regardless of when the person was convicted of the qualifying offense described in subdivision (a) of Section 296 or a similar crime under the laws of the United States or any other state . . ." This same provision applies to individuals on parole, by virtue of PC Section 296.1(g). The DOJ will determine the application of sampling laws to past crimes. No discretion to sample or not will be left to the Department. PC Section 295(d) and (e).

Comment B: Commenter contends that PC Section 295 does not allow the use of force to obtain blood samples from persons other than those recently convicted of crimes listed in Section 296(a). He contends the Department appears to find support in Senate Bill 1242, which amended PC Section 298.1, and now permits use of force to obtain DNA, but there is no clear legislative intent to impose this condition on persons whose prior crimes may fall under Section 296 (a). He contends that even if it did, it would be unlawful to apply the law retroactively and that Departments regulation governing the same issue cannot be applied retroactively. He further contends that the Director has the authority to modify rules and regulations pertaining to the daily and orderly operation of prisons under his control, but he does not have the authority to make the law more specific in order to serve a purpose not listed or considered by the Legislature.

Accommodation: None.

Response B: The Department contends that the Databank statutes explicitly provide PC Section 296.1(c): "This subdivision applies regardless of when the person was convicted of the qualifying offense described in subdivision (a) of Section 296 or a similar crime under the laws of the United States or any other state . . ." This same provision applies to individuals on parole, by virtue of PC Section 296.1(g).

Comment C: Commenter contends that subjecting persons with prior PC Section 296 (a) crimes would be more burdensome in its practical application in that inmates would be able to crowd the courts with potentially valid complaints that would take years to resolve. Commenter notes *Monge v. California* and *Apprenti v. New Jersey* states that these cases and others will justify review when an inmate files the appropriate court documents and the Department may lose valuable time and resources while preparing its defense.

Accommodation: None.

Response C: The Department is mandated to collect samples under PC Section 296.1(b). Ensuing prosecution is not a matter within the Department's purview.

Comment D: Commenter contends that by permitting the use of force to obtain DNA specimens the Department is effectuating an enlargement of the law. This may or may not be permissible under federal jurisprudence. He contends that inmates will have great joy in presenting claims to the courts since the language referenced could be construed as substantially a change in the elements required to prosecute, charge, or sustain the conviction. He contends that most importantly, the Department risks opening the door for inmates to file habeas corpus petitions claiming their prior convictions are invalid for a host of reasons because most of the prior convictions would likely be old and there will be no form of procedural concerns available to block a mass exodus.

Accommodation: None.

Response D: The Department contends these regulations do not change the Penal Code. Prior convictions are enumerated by statute. The date is irrelevant.

Commenter #3:

Comment A: Commenter contends that the CDC is not the police force for the DOJ and that collecting DNA samples and specimens for the DOJ by violent force is not authorized by the legal authority of PC Section 5054. Commenter also contends that collecting DNA samples for another state agency is distinct from the regulations for the administration of prisons. She contends that the DNA materials serve no use for the prisons, are not related to the care, custody, treatment, discipline, or employments of prisoners, nor does the collection of such samples fall under the administration of running state prisons and therefore serves no legitimate peonological purpose.

Accommodation: None.

Response A: The Department contends that the duty of the Department to collect samples from qualifying offenders and submit them to the DOJ Databank is set forth in PC Section 296.1(c) and (g), and the authority to use reasonable force against individuals who refuse to provide them when required, is set forth in PC Section 298.1. The general authority of the Department under PC 5054 is not dispositive.

Comment B: Commenter contends that for penological purposes, finger printing is sufficient identifying information. For the purpose of solving unsolved crimes, one is not violently attacked for taking the 5th amendment (refusal to incriminate oneself). She contends that

violence is outrageously overreacting when no charges are pending and when there is low probability such chares will ever be made. Commenter contends that CDC's proposed changes lose sight of legislative intent which properly focuses on crimes of sexual predators and serial killers who's particular psychological predispositions are correlated and repeat offenses versus persons with, for example a single, 25 year old, imperfect, self defense plea-bargain into a GBI [Great Bodily Injury].

Accommodation: None.

Response B: The Department contends that the DNA Databank program works much the same way as Fingerprint ID programs, but can identify much more biological evidence. *King, Jones v. Murray* (4th Cir. 1992) 962 F.2d 302 ["*Jones"]*. Because DNA profiles are not testimonial in nature, taking them does not violate the Fifth Amendment. *Shaffer v. Saffle* (10 Cir. 1998) 148 F.3d 1180. Only reasonable force will be used in taking samples, and then only after inmates refuse to provide required sample. PC Section 296(a), which enumerates qualifying offenders, specifies more than sex offenders.

Comment C: Commenter contends that both SB 1242 and the proposed regulations are too vague with regard to reasonable force. Commenter states that it is not clear what reasonable force is, and that this must be defined for both the safety of the inmates and the guards. She contends that this must be clear so that guards cannot file assault and battery charges against inmates. She also contends that this lack of clarity is also multiplied by the fact that CDC builds their prisons in rural, economically impeded areas which has resulted in a workforce of uneducated, racist work force. She contends that these vague regulations leave the "reasonable" determination up to the people even though CDC has a gross record of violent misconduct. She states that CDC staff need specific and clearly defined limits for the attack squads preparing prisoners for DNA to be taken.

Accommodation: None.

Response C: The Department contends that PC Section 298.1 defines reasonable force as "the force that an objective, trained and competent correctional officer, faced with similar facts and circumstances, would consider necessary to gain compliance with this chapter." The Department contends that Section 3025(i) of this regulation clearly refers to this same definition as set forth in Title 15, Section 3268; therefore there is no need to include the definition of reasonable force in this regulation because that would be duplication of an existing regulation.

Comment D: Commenter contends that the legal obligation for any citizen or resident of the United States is to yield to law, yet this does not relieve the government of fair warning of the consequences of one's choices, and in some instances explaining "why" a particular refusal is illegal, or to provide information of any process to which he or she is subject.

Accommodation: None.

Response D: The Department contends that these regulations clearly state that the inmate is given written notice that they are required to submit to the DNA testing and informed that failure to do so will result in them being charged with a serious rules violation and a misdemeanor.

Comment E: Commenter contends that the 14th amendment and pendent case law has long held that prisoners are entitled to proper notice (fair warning) of the prescribed conduct before severe sanctions may be imposed. She contends that notice, in its legal sense, is information regarding DNA use and includes fair warning of the consequences of refusal.

Accommodation: None.

Response E: The Department contends that inmates are not entitled to any due process hearing before providing a sample, nor prior to the use of reasonable force necessary to the collection of one. *Rise*. The Department provides written notice that such samples are required, prior to misdemeanor or serious rules violation prosecution.

Comment F: Commenter contends that the proposed procedure hardly visits legislative intent of SB 1242 or PC Section 298.1 enacted by that bill for the creation of guidelines "governing" the use of reasonable force. In addition, he contends that notice is statutorily added by the legislature and is morally proper. Notice, in its legal sense, is information regarding DNA use and includes fair warning of the consequences of refusal. The refusal to provide such notice infers a rush to punish or attack prisoners.

Accommodation: None.

Response F: The Department will still provide written notification of the obligation to provide a DNA sample prior to prosecuting a qualifying offender for refusal, for due process reasons. Regulation Section 3315(a)(3)(S) struck the reference to "in accordance with Penal Code Section 298.1" because written notice under the statute is provided prior to misdemeanor prosecution. Written notice of the obligation to provide a sample, or be prosecuted by the Department for a serious rules violation, warns of different consequences for refusal, and is a different notice and not specified in PC Section 298.1.

Comment G: Commenter contends that the CDC should be able to offer up a creative alternative to violence, but haven't because of a desire to control the rulemaking process by only looking to alternatives brought to the attention of the department by outsiders.

Accommodation: None.

Response G: The Department contends the Legislature has determined that no alternative considered would be more effective in collecting samples from qualifying offenders who refuse.

Comment H: Commenter contends that one obvious alternative solution short of violent attacks to control the decisions and behaviors of women prisoners, would be to restore the myriad of so-called privileges whose removal serves no legitimate peniological purpose, but rather results in dehumanizing, de-grooming, self-esteem crushing, and punishment, creating a habit of the odd appearance of one who has been incarcerated. She contends that the CDC can gain control by giving the female inmates incentives (she has a list of them) from 30 lbs. of Hostess Twinkies to the opportunity to participate in interesting life-enhancing classes, produce plays, and have talent shows. She contends that if the Department gives these things back to the inmates, then the threat of removal will give CDC control instead of using violence.

Accommodation: None.

Response H: The Department contends the Legislature has determined that no alternative considered would be more effective in collecting samples from qualifying offenders who refuse.

Comment I: Commenter contends that propagating violence for non-security, non-prison goals and for other state agencies, sets a dangerous precedent. She states that any state agency which moves backward to a barbarianism society (condoning violence to compel

compliance) ignores contemporary standards of punishment brought about by the advancement of the human race.

Accommodation: None.

Response I: The Department contends the Legislature has determined that no alternative considered would be more effective in collecting samples from qualifying offenders who refuse.

Comment J: Commenter contends that it doesn't take a rocket scientist to recognize the logical conclusion of allowing violence to bend the will of prisoners to submit to DNA. Soon violence will be routine for any matter of prison business since its okay to attack prisoners for things not even related to prison security or prison needs.

Accommodation: None.

Response J: The Department contends that the Legislature has determined that no alternative considered would be more effective in collecting samples from qualifying offenders who refuse.

Comment K: Commenter makes several comparisons of the proposed collection process to the plantation, concentration camps, medieval prisoners, pimps, and gang-bangers.

Accommodation: None.

Response K: Although the above comment/objection does regard an aspect or aspects of the subject proposed regulatory action or actions and must be summarized pursuant to GC Section 11346.9(b)(3), the comment/objection is either insufficiently related to the specific action or actions proposed, generalized, or personalized to the extent that no meaningful response can be formulated by the Department in refutation of or accommodation to the comment.

Comment L: Commenter contends that time is money, if CDC isn't going to hire additional Lab Technicians, then their time is taken from the needs of prisoners for another state agency.

Accommodation: None.

Response L: Although the above comment/objection does regard an aspect or aspects of the subject proposed regulatory action or actions and must be summarized pursuant to GC Section 11346.9(b)(3), the comment/objection is either insufficiently related to the specific action or actions proposed, generalized, or personalized to the extent that no meaningful response can be formulated by the Department in refutation of or accommodation to the comment.

Comment M: Commenter contends that gross court costs will be incurred through CDC's proposed use of violence, especially in women's prisons where security guards, "big burly men", file assault charges against female prisoners even though they have not been harmed.

Accommodation: None.

Response M: Although the above comment/objection does regard an aspect or aspects of the subject proposed regulatory action or actions and must be summarized pursuant to GC Section 11346.9(b)(3), the comment/objection is either insufficiently related to the specific action or actions proposed, generalized, or personalized to the extent that no meaningful response can be formulated by the Department in refutation of or accommodation to the comment.

Comment N: Commenter contends that CDC agents relying on the poor academic backgrounds of most prisoners and fear no lawsuits where, in California Prisons, a pattern of excessive force already exists.

Accommodation: None.

Response N: Although the above comment/objection does regard an aspect or aspects of the subject proposed regulatory action or actions and must be summarized pursuant to GC Section 11346.9(b)(3), the comment/objection is either insufficiently related to the specific action or actions proposed, generalized, or personalized to the extent that no meaningful response can be formulated by the Department in refutation of or accommodation to the comment.

Comment O: Commenter contends that the thumb and palm prints are a waste of time and economic resources because collection of them is redundant. DOJ already possesses these.

Accommodation: None.

Response O: The Department contends thumb and palm prints are part of the collection kit required by PC Section 295, et seq., and submission of component pieces is not permitted.

Comment P: Commenter contends that proposed disciplinary reports and necessary incident reports like the 602 appeal processes are costly to generate.

Accommodation: None.

Response P: Although the above comment/objection does regard an aspect or aspects of the subject proposed regulatory action or actions and must be summarized pursuant to GC Section 11346.9(b)(3), the comment/objection is either insufficiently related to the specific action or actions proposed, generalized, or personalized to the extent that no meaningful response can be formulated by the Department in refutation of or accommodation to the comment.

Comment Q: Commenter contends that the psycho-socio predispositions of CDC security guards will cause medical hospital costs to be incurred with CDC's introduction of violence.

Accommodation: None.

Response Q: Although the above comment/objection does regard an aspect or aspects of the subject proposed regulatory action or actions and must be summarized pursuant to GC Section 11346.9(b)(3), the comment/objection is either insufficiently related to the specific action or actions proposed, generalized, or personalized to the extent that no meaningful response can be formulated by the Department in refutation of or accommodation to the comment

Comment R: Commenter contends that the fact that the legislature found a need to protect society from crimes which are strongly motivated by statistically incurable and particularized psychological predispositions, violence against women prisoners to force samples without such criminal charges pending (or even likely), is over reading and should be prohibited. She also states that CDC's plan is excessive when it touches women who have a single, 25 year old, imperfect, self defense plea-bargained as a GBI [Great Bodily Injury]. The CDC should be case specific in its use of violent assault to obtain DNA samples for the DOJ.

Accommodation: None.

Response R: Although the above comment/objection does regard an aspect or aspects of the subject proposed regulatory action or actions and must be summarized pursuant to GC

Section 11346.9(b)(3), the comment/objection is either insufficiently related to the specific action or actions proposed, generalized, or personalized to the extent that no meaningful response can be formulated by the Department in refutation of or accommodation to the comment

Commenter #4:

The Department received a letter from Mr. Bailey with scribbles in the margins of a letter addressed to Mr. Bailey from the United States Supreme Court with many comments that were illegible and incomprehensible. In addition, there were several hand written pages, which were also incomprehensible. However, the Department was able to discern a few issues the commenter had that are applicable to this regulation which are as follows:

Comment A: Commenter contends that the CDC is doing illegal research and seeks to inject inmates annually with TB.

Accommodation: None.

Response A: Although the above comment/objection does regard an aspect or aspects of the subject proposed regulatory action or actions and must be summarized pursuant to GC Section 11346.9(b)(3), the comment/objection is either insufficiently related to the specific action or actions proposed, or generalized or personalized to the extent that no meaningful response can be formulated by the Department in refutation of or accommodation to the comment

Comment B: Commenter contends that the Department seeks to not abide by the 2-year waiting period before new laws are effective and that the Department only gave a 15-day window of explanation in December prior to this regulation being effective.

Accommodation: None.

Response B: The Department contends that we have complied with the APA and PC Section 5058.3 in promulgating and implementing these emergency operational necessity regulations.

Comment C: Commenter contends PC Section 296 is a 5th amendment violation and Miranda rights.

Accommodation: None.

Response C: The DNA Databank program works much the same way as Fingerprint ID programs, but can identify much more biological evidence. *King, Jones v. Murray* (4th Cir. 1992) 962 F.2d 302 [*"Jones"]*. Because DNA profiles are not testimonial in nature, taking them does not violate the Fifth Amendment. *Shaffer v. Saffle* (10 Cir. 1998) 148 F.3d 1180.

Comment D: Commenter contends that there is no emergency reason to circumvent the two-year waiting period, especially since the authors are treasonist and their motives to pass laws to help them cannot qualify as emergency operatives. Also their hidden agendas are unconstitutionally vague.

Accommodation: None.

Response D: The Department contends that we have complied with the APA and PC Section 5058.3 in promulgating and implementing these emergency operational necessity regulations.

Commenter #5:

Comment A: Commenter objects to the taking of blood and saliva samples for placement in the DNA databank, unless probable cause is shown and warranted. If a sample is requested the commenter is objecting and will not willing provide a sample. He contends that DNA profile is the mark of the Beast which is described in the Bible in Revelations 13:8-18 and 14:11, and which declares eternal torment for those who accept the mark of the beast, which is getting a DNA profile done.

Accommodation: None.

Response A: The Department contends that *Rise* and *King* uphold the DNA Databank against Fourth Amendment objections. Although the remaining portion of the above comment/objection does regard an aspect or aspects of the subject proposed regulatory action or actions and must be summarized pursuant to GC Section 11346.9(b)(3), the comment/objection is either insufficiently related to the specific action or actions proposed, generalized, or personalized to the extent that no meaningful response can be formulated by the Department in refutation of or accommodation to the comment.

Comment B: Commenter contends that passing a law doesn't make the collection of DNA constitutional and provides an example of Colonial Virginia passing laws requiring runaway slaves be returned to their owners and allowing dismemberment of runaways to terrorize and dissuade others from flight. Commenter further contends that California employees who collect DNA samples without probable cause will be liable for damages.

Accommodation: None.

Response A: The Department contends that the California DNA Databank was explicitly upheld as constitutional in *Alfaro*.

Comment C: Commenter contends that collecting DNA is analogous to the collection of money from incarcerated persons rather than from persons similarly situated because they also owe fines or fees which should be collected, but which are not mandated by statute because it is easier to collect from those under direct supervision. He argues that such a distinction has been held to be arbitrary and a violation of the equal protection clause by the United States Supreme Court in Rinaldi v. Yeager which leaves California's employees liable. It is contended that California cannot constitutionally require only prisoners and parolees to give DNA samples; rather it must require collections from all persons who have ever been convicted of the specified crimes including in other states or countries.

Accommodation: None.

Response C: *Rinaldi* found a statute that required only incarcerated persons, i.e., those unable to afford bail, and pay court costs, violative of equal protection guarantees. PC Section 295 et seq. requires all qualifying offenders, regardless whether incarcerated, on parole, or even citizens, provide samples. The Department can and will collect only from those offenders under its jurisdiction—prisoners and parolees. Because the only distinction under the statute is based on criminal history, the Department contends its collection does not violate equal protection guarantees.

Comment D: Commenter contends that California law and regulations do not permit collection of DNA specimens from persons convicted of the specified crimes prior to enactment of said laws and regulations, who were never sentenced to prison. It also excludes those who have completed parole even though they have numerous prior qualifying convictions in California or other states or countries. Those exemptions make California's codes violate equal protection (Rinaldi v. Yeager).

Accommodation: None.

Response D: The Department contends that PC Sections 295, et seq. requires all qualifying offenders, regardless of when they committed their qualifying offense, to provide samples.

Comment E: Commenter contends California DNA collection codes do make distinctions that have no relevance to the purpose for which the classification is made. It is asserted that since the purpose of collecting DNA is "Special Need" public safety to solve past and future crimes and to deter future crimes, collecting only from prisoners and parolees is an unreasoned distinction, which cannot be justified on the grounds of administrative convenience (Rinaldi v. Yeager). He contends that DNA collection statutes must be applied evenly to all citizens regardless of present supervision.

Accommodation: None.

Response E: The Department contends that *Rinaldi* found a statute that required only incarcerated persons, i.e., those unable to afford bail, and pay court costs, violative of equal protection guarantees. PC 295 et seq. requires all qualifying offenders, regardless whether incarcerated, on parole, or even citizens, provide samples. Although the remaining portion of the above comment/objection does regard an aspect or aspects of the subject proposed regulatory action or actions and must be summarized pursuant to GC Section 11346.9(b)(3), the comment/objection is either insufficiently related to the specific action or actions proposed, generalized, or personalized to the extent that no meaningful response can be formulated by the Department in refutation of or accommodation to the comment.

Comment F: Commenter contends that while some past courts have held that the collection of DNA samples from prisoners was permissible, those decisions are primarily made by ex-prosecutors who are still acting in the role while hiding under a judge's robe. Commenter contends the previous rulings are unconstitutional and similar to racist U.S. Supreme court members who declared Dredd Scott should be returned to his master. He included a dissenting opinion from Rise v. State of Oregon, Judge Nelson, citing US Supreme court decisions which arguably could make California liable for damages.

Accommodation: None.

Response F: The Department notes that Judge Nelson was the lone dissenter in *Rise,* a Ninth Circuit case upholding the constitutionality of Oregon's DNA databank.

Comment G: Commenter contends that the Department's claim that using DNA for the purpose of establishing identity is wrong. It is argued, essentially, that DNA should not be collected because finger printing's main purpose has never been for identifying past and future unsolved crimes committed by the printed person as is the collection of DNA.

Accommodation: None.

Response G: The Department contends that the DNA Data Bank program works much the same way as Fingerprint ID programs, matching crime scene evidence to anonymous computerized identification data from convicted persons in order to aid in expeditious and accurate crime-solving. *King, Jones v. Murray* (4th Cir. 1992) 962 F.2d 302 ["*Jones"]*. Because DNA profiles are not testimonial in nature, taking them does not violate the Fifth Amendment

Comment H: Commenter contends that probable cause connecting him to specific unsolved crimes in which DNA was left by the perpetrator, is required to be established before DNA can be collected. He is concerned that state agents could then plant those samples as evidence.

He contends that the specimens must never be in the custody of the state, rather in his attorney's custody only available for genetic code comparison.

Accommodation: None.

Response H: The Department contends that *Rise* and *King* explicitly held that DNA Databanks do not violate the Fourth Amendment. Analysis of the samples and prints is authorized "only for identification purposes". All DNA and forensic identification profiles retained by DOJ may be used only for law enforcement purposes and are exempt from any law requiring disclosure of information to the public. No information obtained from the print and sample submissions may be included in a person's criminal history. Only anonymous DNA records may be used for training, research, and statistical population analysis. Disposal of unused sample portions must be done in a way to protect the origin of the sample. Breach of the confidentiality provisions carries criminal penalties. PC Section 295, et seq.

Comment I: Commenter contends that when such a profile doesn't match the crime of which there was probable cause for comparison, the profile must be purged from government files to remove the "mark of the beast" [biblical reference].

Accommodation: None.

Response I: The Department contends that *Rise* and *King* explicitly held that DNA Databanks do not violate the Fourth Amendment. Although the remaining portion of the above comment/objection does regard an aspect or aspects of the subject proposed regulatory action or actions and must be summarized pursuant to GC Section 11346.9(b)(3), the comment/objection is either insufficiently related to the specific action or actions proposed, generalized, or personalized to the extent that no meaningful response can be formulated by the Department in refutation of or accommodation to the comment.